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In the Supreme Court of the United States

October Term, 1978

No. 78-1729

UNITED STATES OF AMERICA,
Petitioner,

vs.

JACK PAYNER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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OPINIONS BELOW

Respondent accepts Petitioner's statement of opinions below.

JURISDICTION

Respondent accepts Petitioner's statement of jurisdiction.

QUESTIONS PRESENTED

1. Whether the Court below properly exercised its Supervisory Power in excluding all evidence obtained as a result of the willful, intentional and outrageous criminal conduct by Government agents.

2. Whether evidence, obtained through the commission of criminal acts by Government agents, was properly suppressed under the Due Process Clause when the illegal conduct was outrageous and suppression was necessary in order to deter repetition of the criminal conduct.

STATEMENT OF FACTS

Respondent accepts the Government's statement of facts with the following additions and corrections:

When Operation Trade Winds first commenced with the use of over 30 informants in 1965 until April or May, 1974, the Government issued no subpoenas, search warrants or administrative IRS summons. This, in spite of the fact that in June, 1972 IRS suspected that Castle Bank in the Bahamas functioned as an illegal tax haven for American taxpayers and that it had an account with the Bank of Perrine in Florida.

However, a little over a year after the "briefcase caper", as it was labeled by the IRS (A. 318), a Federal Grand Jury issued subpoenas for witnesses and documents. As a result, a loan guaranty was produced by the Bank of Perrine allegedly executed by Respondent Payner and dated April 25, 1972 (A. 166). The Government concedes that this guaranty was the key to its case. Witness, Sam Pierson, former officer of the Perrine Bank, and all other

witnesses who testified at the trial for the Government and all documents introduced, except for Payner's tax returns, were discovered as a direct result of the illegal seizure in January, 1973.

The record indicates that Jaffe submitted a report on Project Haven to a committee of the United States Congress, which referred to the "Briefcase Caper," stating:

> "The information obtained from the informant was extremely valuable and was unavailable from any other source. It [the briefcase] provided the leads as to where to serve the grand jury subpoenas." (A. 243)

In granting the suppression motion, the District Court found that the Government had not met its burden of showing the suppressed evidence was not the fruit of its criminal conduct, which conduct the Court labeled as "both purposefully illegal and an intentional, bad faith act of hostility". The Court said:

> "Viewing Richard Jaffe's testimony as a whole, including his demeanor while presenting his testimony, . . . [that testimony] . . . was *unconvincing.*" (Petitioner's Appendix F, p. 30a)

The Court specifically found that:

> ". . . it was not coincidence that the Perrine Bank was served with subpoenas shortly after information in the briefcase had been examined and discussed throughout the I.R.S. districts in the United States." (Petitioner's Appendix F, p. 31a)

Consequently, the District Court concluded:

> "The Court finds that the briefcase seized on January 15, 1973 provided the leads which resulted in

the issuance of subpoenas to the Bank of Perrine in April and May, 1974. Further the Court finds that Exhibit 4 is a product of the seizure of January 15, 1973, and that the subsequent investigation and indictment of Jack Payner stemmed from the January 15, 1973 seizure." (*Id.* p. 32a)

The District Court based its suppression order upon the fact that because the Government's agent obtained the subject evidence by purposeful criminal conduct, perpetrated in bad faith hostility to constitutional rights, it violated Respondent's Due Process rights under the Fifth Amendment to the United States Constitution. The Court further held that, notwithstanding the Due Process violations, it was suppressing the subject evidence under its inherent Supervisory Powers. From this Order the Government appealed, and the appeal was dismissed on March 17, 1978 for lack of jurisdiction. *United States v. Payner*, 572 F.2d 144 (6th Cir., 1978).

In the Government's second appeal the Circuit Court affirmed the Order of the District Court based upon the District Court's Supervisory Powers, stating that it did not need to reach the Fifth Amendment issue. Of necessity, while not discussing the issue, the Circuit Court affirmed the District Court's finding that the suppressed evidence was tainted. That finding was based upon testimonial evidence and the fact that the Government had failed to introduce any evidence to meet its burden of proving an independent source or lack of taint.

REASONS FOR DENYING THE PETITION

I. UNDER ITS HISTORIC SUPERVISORY POWERS, CONSISTENT WITH THE RULINGS OF THIS COURT, THE TRIAL COURT PROPERLY EXCLUDED ALL EVIDENCE OBTAINED AS A RESULT OF THE WILLFUL, INTENTIONAL AND OUTRAGEOUS ILLEGAL CONDUCT ON THE PART OF THE GOVERNMENT AGENTS.

The Government in its Petition predicates its argument on the assertion that none of Respondent's Constitutional rights were violated by the use of the evidence obtained through a purposeful burglary. Such is clearly untrue. The District Court, relying on a long line of authority from this Court (as discussed *infra*), held that Respondent's Due Process rights under the Fifth Amendment were indeed violated both by the criminal conduct in obtaining the suppressed evidence and also in the use of such evidence in the trial. While the Government also asserts in its Petition that the subject evidence was not tainted, that matter was resolved by the District Court upon factual conclusions, based upon the evidence at the Suppression Hearing.

It should be noted by this Court that though the Government represents that the suppressed evidence was not tainted, it has stipulated in another pending case, *United States v. Baskes*, (No. 77 CR 238, N.D. Ill.), in which it used information from the "briefcase caper" to obtain its evidence and indictment, that:

> "While the government already knew Castle Bank and Trust had accounts at the American National Bank

and the Bank of Perrine, the impetus for these grand jury subpoenae stemmed from the information received from the briefcase." Paragraph 26.

A. The Government's Conduct in Perpetrating the "Briefcase Caper" Was Clearly Illegal.

As the District Court set forth in Footnote 66 of its Opinion below (A. 50, Petitioner's Appendix F, p. 48a), the actions of the Government operatives[1] in obtaining confidential bank records from the briefcase of Wolstencroft satisfy the elements of a *prima facie* case of criminal larceny under Florida law, Fla. Stat. Ann. §§812.011, 812.-021(1)(a) Fla. Stat. Ann. and 812.021(5) Fla. Stat. Ann. and Jaffe himself was guilty as a "principal". Fla. Stat. Ann. §777.011.

The District Court below further noted that:

> "The type of conduct which the government agents exhibited in connection with the 'briefcase caper' was so outrageous and improper that it probably satisfies the elements of F.S.A. Section 812.081 criminalizing the unauthorized appropriation of trade secrets, such as secret 'lists of customers' by copying such list without permission of the owner. See Section 812.081 (1)(c), (3)." (A. 50, n. 66, Petitioner's Appendix F, p. 48a)

That section carries a different penalty from that of larceny and is an independent crime.

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1. Casper's actions were for the benefit of the IRS and he was paid $8,000.00 for his efforts by Jaffe, an employee of the IRS (A. 317).

B. The Affirmance of the Trial Court's Exercise of Its Supervisory Powers Was Consistent With This Court's Prior Rulings.

This case presents nothing new to this Court, as it is merely an example of a Federal Court's exercising its duty to exclude evidence which the Government obtained in a manner inconsistent with the American standard of justice. To not have exercised that power would have permitted the violation of the basic integrity of the Federal system of justice. In *McNabb v. United States,* 318 U.S. 332, 339-340 (1943), the Court stated:

> "It is true, as the petitioners assert, that a conviction in the Federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand."
>
> * * * * *
>
> "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force."

The Trial Court properly determined that the conduct of the Government in the "briefcase caper" was ". . . purposefully illegal and an intentional bad faith act of hostility . . ." (A. 57). Government agents intentionally violated the law, having discussed the position that the Government now again asserts, that the intended targets of their illegal conduct would have no redress, as they would lack standing to claim any Fourth Amendment violation.

It has been a long-recognized duty of Federal Judges to take whatever action is necessary, including the imposi-

tion of the Exclusionary Rule to prevent the Federal Courts from being demeaned, through their use as a forum, to sanction lawlessness on the part of law enforcement officers. The exclusion of the evidence in question was the least that could be done to maintain the integrity of the judicial process.[2] As this Court said in *Mapp v. Ohio*, 367 U.S. 643, at 659 (1961):[3]

> "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the character of its own existence."

The recent decision of *United States v. Valencia*, 541 F.2d 618 (6th Cir., 1976), exemplified the duty of a Federal Court to protect the integrity of the Federal judicial system by excluding evidence obtained in a manner which would taint that system.[4]

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2. Interestingly, the Government, while arguing that neither District nor Circuit Courts have the power to impose the limited remedy of excluding evidence obtained as a result of the illegal conduct of Government, concludes that both the District and Circuit Courts do have the ultimate power of dismissing indictments obtained by grossly improper Government conduct. The positions are clearly inconsistent.

3. See also, *Brown v. Illinois*, 422 U.S. 590 (1975); *Elkins v. United States*, 364 U.S. 206 (1960); *Nardone v. United States*, 302 U.S. 379 (1937); *Benanti v. United States*, 355 U.S. 96 (1957); *Mesarosh v. United States*, 350 U.S. 922 (1956); *Lopez v. United States*, 373 U.S. 427, *reh. den.*, 375 U.S. 870 (1963); *Ker v. California*, 374 U.S. 23 (1963); *Communist Party v. Subversive Activities Con. Bd.*, 351 U.S. 115 (1956).

4. In *Valencia*, a secretary to an attorney who was representing co-defendants of the movant passed confidential memoranda and other information to Federal officers. The Sixth Circuit held that any evidence which was the fruit of such grossly improper conduct, in violation of the attorney-client privilege, and which resulted in prejudice to the defendants, must be excluded under the Court's Supervisory Power. In *Valencia*, all fruits of such conduct were held to be inadmissible, *even though the attorney-client privilege which was violated was not the privilege of the parties seeking suppression.* The Court properly disregarded the fact that the privilege violated was not personal to the movant and remanded the case to the District Court to determine, specifically, which evidence was the fruit of the Government's improper conduct.

The case at bar presents an even stronger case for suppression than does *Valencia*. In *Valencia*, the only improper conduct by Government officials, outrageous as it was, was to induce a secretary to breach her employer's attorney-client privilege. In the case at Bar, Federal agents actually conspired to and committed various crimes in utter disregard of state and Federal law, knowing such conduct to be illegal, but with the misguided belief that the evidence that they obtained would not be subject to challenge.

The Government, in its Petition argues that a Federal Court's Supervisory Power to limit the introduction of evidence exists only in the absence of a relevant Act of Congress. The Government then cites Rule 402 of the Federal Rules of Evidence, which provides that:

> "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

The Government asserts that, since Rule 402 does not prevent the admissibility of evidence obtained by illegal conduct so long as the Fourth or Fifth Amendment were not violated (which they claim were not), the Court cannot prevent the admission of such evidence solely under its Supervisory Powers. The same argument has been made previously by the Government and has been strongly rejected. In *United States v. Jacobs*, 547 F.2d 772, 777 (2d Cir., 1976), *cert. dismissed as improvidently granted*, 436 U.S. 31 (1978), the issue discussed was the admissibility of particular statements made to a grand jury. The Second

Circuit rejected the same Government argument as has been presented to this Court by stating:

> ". . . the Government takes the extreme position that by Rule 402 of the Federal Rules of Evidence (a Congressional enactment) relevant evidence is to be excluded solely in those cases where exclusion is required by 'the Constitution of the United States, by Act of Congress, by these Rules, by other rules prescribed by the Supreme Court, pursuant to statutory authority.' It offers no history to support the view that Congress was concerning itself with supervisory powers of the federal court. The obvious purpose of the catchall clause was to bar common law rules of evidence or state rules of evidence, if inconsistent."

The Second Circuit clearly and properly interpreted Rule 402 as providing no basis to strip from the Federal Judiciary its historic power to supervise the Federal Judicial process by excluding evidence obtained in a manner that a Federal Court deems to be so grossly improper as to be a threat to the integrity of the entire Federal Judicial System. That position was implicitly followed by the Sixth Circuit herein. There exists no conflict among circuits and no reason for review.

The Government does not deny the illegal acts of its agents. Rather than attempt to justify its activities, the Government asserts that there is no remedy available to the Respondent. It is precisely to prevent the growth and development of this callous and lawless attitude on the part of our Government that Courts exercise their Supervisory Powers in excluding evidence.

In *Lopez v. United States*, 373 U.S. 427 (1963), this Court did state, as the Government cites in its Petition that:

> ". . . the Court's inherent power to refuse to receive material evidence is a power that must be sparingly exercised." *Id.* at 440.

However, in the next sentence, this Court went on to state:

> "Its application in the present case, *where there has been no manifestly improper conduct by federal officials*, would be wholly unwarranted." *Id.* (Emphasis added)

In the instant case, Judge Manos, following the criteria of *Lopez*, made a specific finding that the actions of the federal agents were not merely "manifestly improper", but were "outrageous" and knowingly "illegal,"[5]

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5. Judge Manos also found:

> ". . . the Government's action in this case was both purposefully illegal and an intentional, bad faith act of hostility . . ." (A. 57, Petitioner's Appendix F, p. 62a)
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> . . . .
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> ". . . the United States . . . knowingly and willfully participated in the *unlawful* seizure . . . (A. 36, Petitioner's Appendix F, p. 25a)
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> . . . .
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> ". . . the United States was an active participant in the admittedly criminal conduct . . ." (A. 37, Petitioner's Appendix F, p. 26a)
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> . . . .
>
> ". . . the illegal conduct of the government officials involved in this case compels the conclusion that they knowingly and purposefully obtained the briefcase materials with *bad faith hostility* toward the strictures imposed on their activities by the Constitution. (A. 50, Petitioner's Appendix F, p. 48a)
>
> . . . .
>
> "The Activities of the Government agents [were] . . . outrageous. They plotted, schemed and ultimately acted in contravention of the United States Constitution and laws of Florida, knowing that their conduct was illegal. It is imperative to signal all likeminded individuals that purposeful criminal acts on behalf of the Government will not be tolerated in this country . . . (A. 51, Petitioner's Appendix F, p. 50a)
>
> . . . .
>
> "The need to deter gross illegal activity on the part of the Government, such as occurred in this case, is clear." *Id.*

unlike *Lopez* where there was ". . . no act of any kind which could justify the creation of an exclusionary rule."

Mr. Justice Powell, joined by Mr. Justice Blackmun in a concurring opinion in *Hampton v. United States,* 425 U.S. 484, 493 (1976),[6] foresaw the issue of this case, and used the term "outrageous police conduct" to describe instances where a District Court should exercise its Supervisory Powers. In Footnote 6, of his Opinion, Mr. Justice Powell observed that an analysis of the appropriate use of Supervisory Powers is like an analysis under the Due Process Clause, where the test is fundamental fairness under the circumstances. *Rochin v. California,* 342 U.S. 565 (1952).

The Government claims that this Court ought to grant its Petition for a Writ of Certiorari because, if the District Court indeed has Supervisory Powers, it is necessary for this Court to set rigid standards for the exercise of those powers.[7] However, as recognized by Mr. Justice Powell in *Hampton v. United States, supra* at 494 n.6, there are no "sharply defined standards" of "outrageous" government conduct. Each case must be judged "in light of all the circumstances". While in the proper case, where a District Court exercised its Supervisory Powers in a

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6. As Judge Rubin, in his dissenting opinion in *United States v. Leja,* 563 F.2d 244, 247 (6th Cir., 1977), stated:

> "It is clear from the concurrence and majority opinions in *Hampton v. United States,* that a majority of the United States Supreme Court recognized that there may be a level of egregious governmental participation in criminal activity that is proscribed, no matter how worthy the objective or how deceitful the adversary."

That level was clearly reached and surpassed in the instant case.

7. Contrary to the Government's assertion, the decision in *United States v. Baskes,* 442 F. Supp. 322, 333-334 (N.D. Ill., 1977), Appeal Pending (No. 17-2178, 7th Cir.), was based on the conclusion that the subject evidence was not tainted by the "briefcase caper".

"borderline" set of facts, review by this Court might be appropriate. No purpose would be served by this Court reviewing the District Court's exercise of its Supervisory Powers herein, as there is no dispute of the illegal and outrageous nature of the governmental conduct involved. Clearly, that is why the Court of Appeals found it unnecessary to comment in any more detail in its opinion.

II. EVEN WITHOUT CONSIDERATION OF THE TRIAL COURT'S SUPERVISORY POWERS, EVIDENCE OBTAINED THROUGH THE COMMISSION OF VARIOUS CRIMES BY GOVERNMENT AGENTS WAS PROPERLY SUPPRESSED BY THE TRIAL COURT IN ORDER TO PROTECT RESPONDENT'S DUE PROCESS RIGHTS.

A. The Government's "Bad Faith Hostility" to the Legal Process in Perpetrating the "Briefcase Caper" Resulted in a Clear Violation of Payner's Due Process Rights.

While the Circuit Court never had to reach the issue, Respondent deems it appropriate to at least discuss the fact that even if the District Court had not suppressed the tainted evidence on the basis of its Supervisory Powers, it also properly suppressed it pursuant to the Due Process Clause of the Fifth Amendment.[8] The Government asserts that the opinion of the Court of Appeals "proceeds on the assumption that the illegal search of Wolstencraft's briefcase did not violate any of Respondent's constitutional or statutory rights." (Petitioner's Brief, p. 11). That assertion is patently incorrect. The Court below stated that

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8. As recognized by Mr. Justice Powell in *Hampton, supra,* the analysis of suppression under the Court's Supervisory Powers follows in the same manner as the analysis under the Due Process Clause.

because it was affirming the Trial Court's exercise of its Supervisory Powers, it was "not necessary to reach the constitutional questions . . ." (Petitioner's Appendix A, p. 2a). The clear precedent for the exclusion by the Trial Court, of all evidence derived from the Government's illegal conduct followed from *Rochin v. California, supra.* Nothing new or worthy of this Court's consideration is presented in this case.[9]

The pivotal issue is whether the Government agents acted illegally and whether such illegality offended "those canons of decency and fairness which express the notion of justice of English speaking peoples even toward those

9. The words of Mr. Justice Frankfurter were quoted by the Trial Court as the basis for its decision:

> "Regard for the requirements of Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking peoples even toward those charged with the most heinous offenses.' These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or are 'implicit in the concept of ordered liberty'.
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> . . . .
>
> Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts, exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society." 342 U.S. at 169, 172. (Citations omitted)

charged with the most heinous offenses . . .", *id.* at 169.[10]

While the Trial Court recognized that a mere technical violation of the law or conduct committed in good faith, which subsequently proves to be illegal, is not a basis for exclusion of evidence based upon Due Process grounds, *Brown v. Illinois, supra* (Justice Powell concurring); *Brewer v. Williams,* 430 U.S. 387 (1977) (C. J. Berger, dissenting), *reh. den.,* 431 U.S. 925 (1977), the Trial Court properly held that where the Government's illegal conduct was done knowingly and purposefully in "bad faith hostility" to any person's fundamental rights, then society has a strong interest in excluding such evidence in order to deter repetition of such outrageous conduct.

B. In Order to Give Meaning to Respondent's Due Process Rights and to Deter Future Outrageous Conduct by the Government Such As the "Briefcase Caper" All Evidence Illegally Obtained Was Properly Suppressed.

In *United States v. Janis,* 428 U.S. 433 (1976), *reh. den.,* 429 U.S. 874 (1977), this Court enunciated the balancing test which must be applied in invoking the Exclusionary

10. In *United States v. Russell,* 411 U.S. 423 (1973), a Government undercover agent provided a chemical to a defendant who used it to manufacture illegal drugs. The Supreme Court, in finding that *the Government had done nothing illegal,* and had not infringed upon the Due Process Clause, refused to dismiss the indictment. However, the Court specifically stated:

> "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, the instant case is distinctly not of that breed. . . . The law enforcement conduct here stops far short of violating that 'fundamental fairness, shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment." *Id.* at 431-432.

Rule. The Court stated that evidence should be excluded when there is a showing that there exists, " 'a sufficient likelihood of deterring the [unlawful] conduct of the State [Federal] police so that it [the social benefit exclusion] outweighs societal costs imposed by exclusion'." The District Court quite correctly applying the *Janis* test found that:

> ". . . [S]ociety's interest in deterring the Due Process violations outweighs society's interest in allowing the fact finder to view all relevant evidence only when an official's conduct demonstrates bad faith hostility to the strictures imposed on him by the Constitution." (A. 49)

This District Court concluded that:

> "The activities of the Government agents Jaffe and Casper were outrageous. They plotted, schemed and ultimately acted in contravention of the United States Constitution and laws of Florida, knowing that their conduct was illegal. It is imperative to signal all likeminded individuals that purposeful criminal acts on behalf of the Government will not be tolerated in this country and that such acts shall never be allowed to bear fruit."[11] (A. 51, Petitioner's Appendix F, p. 50a)

The suppression of any evidence derived from the "briefcase caper" is mandated by the need to deter such grossly illegal activity on the part of the Government. As Mr. Justice Brandeis stated in *Olmsted v. United States*, 277 U.S. 438, 485 (1927):

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11. See also, *Elkins v. United States*, 364 U.S. 206, 217, 222 (1960); *United States v. Peltier*, 422 U.S. 531, 537-538 (1975); *United States v. Janis*, *supra*, 466; *Mapp v. Ohio*, *supra*, 659; *Brown v. Illinois*, *supra*, 599.

> "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."

This Court stated with regard to the Rule's deterrence rationale:

> "The rule is calculated to prevent, not repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins*, *supra*, 217.

The District Court found that it was clear from the testimony that the only practical way to deter the type of conduct exhibited by Jaffe and Casper on behalf of the Government would be to suppress the evidence that they obtained (A. 54). In fact, there were even discussions among IRS agents that persons whose names were obtained from Wolstencroft's briefcase could not attack the illegal search (A. 363-366).

The Trial Court correctly applied the rationale of *Michigan v. Tucker,* 417 U.S. 433, 447 (1974), "to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of the accused."

The attitude of those involved in planning the "briefcase caper", based upon the belief that the illegal conduct would not in any way affect the admissibility of evidence obtained, is exactly what Justice Frankfurter in *Rochin* sought to eliminate. Since, according to the Government's view, the only person who would have any standing to contest the admissibility of evidence derived from the "briefcase caper" was Wolstencroft, and since at the time of the "caper", the Government had no intention of taking any action against Wolstencroft, without the suppression of such evidence, there would be no deterrent whatsoever to repeated criminal actions on the part of IRS and other Government agencies.[12]

As this Court has repeatedly recognized, without the deterrent of the application of the Exclusionary Rule under the Fifth Amendment, Due Process Clause (and under the Court's inherent Supervisory Powers), Government agents would be free to randomly and openly commit gross criminal violations against persons, whom the Government has no intention of prosecuting, in order to obtain

12. The District Court determined from the record as constituted, that the IRS possessed sufficient information regarding the use, by one Allan Palmer, of the Castle Bank to hide illegal income, combined with information from Casper, that Wolstencroft would be entering the United States with Castle Bank depositors' records, to obtain a valid search warrant for those records (A. 40, n.55, Petitioner's Appendix F, p. 31). *United States v. Manufacturers National Bank of Detroit,* 536 F.2d 699 (6th Cir., 1976), *cert. den.,* 429 U.S. 1039. Therefore, not only was the conduct of the Government agents willful, intentionally illegal and a clearly outrageous violation of the American concept of justice, but it was totally unnecessary.

evidence against persons, who would have no standing to challenge such evidence. In a nation of laws, the Government cannot be permitted to recklessly disregard the rights of individuals and the laws which govern all persons, Government agents as well as private citizens. Without the limitations applied by the Exclusionary Rule, as consistently approved by this Court, such conduct would be repeated over and over again, thereby allowing our Government, whose prime responsibility is the protection of the rights of its citizens, to become the prime violator of those rights. However, with the law clearly enunciated by prior decisions of this Court, and consistently followed by the Courts below, there is no need for this Court to consider the facts in this case, which are even more extreme than those in the cases where it has previously approved the application of the Exclusion Rule.

CONCLUSION

Since this case presents no issue which has not already been decided and resolved by this Court, Respondent respectfully requests that this Court deny the Government's Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

CONSTITUTION AND STATUTES INVOLVED

United States Constitution - Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution - Fifth Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Florida Statutes Annotated §777.011:

"Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and

punished as such, whether he is or is not actually or constructively present at the commission of such offense."

Florida Statutes Annotated §812.011:

"(1) 'Property' means anything of value, including, but not limited to, real estate, tangible and intangible personal property, contract rights, evidences of debt, choses in action and other interests in or claims to wealth, admission or transportation tickets, animals, food and drink, transient accommodations at any public lodging establishment, and gas, water, and electric and other power and telephone service."

Florida Statutes Annotated §812.021(1)(a):

"(1) A person who with intent unlawfully to deprive or defraud the true owner of his property or of the use and benefit thereof, or to appropriate the same to the use of the taker or of any other person:

(a) Takes from the possession of the true owner, or of any other person; or obtains from such person possession by color or aid of fraudulent or false representations or pretense, or of any false token or writing; or obtains the signature of any person to a written instrument, the false making whereof would be punishable as forgery; or secretes, withholds, or appropriates to his own use, or that of any other than the true owner, any property;"

Florida Statutes Annotated §812.021(5):

"It shall be sufficient for any indictment, information, or warrant returned, filed, or issued under this section to charge generally that the defendant, at the

time and in the county specified, did steal the personal or real property, thing in action, evidence of debt or contract, or article of value out of which the prosecution arose, describing the same in general terms and alleging generally the ownership and value thereof. It shall not be necessary when alleging the larceny of property over a period of time that the exact date or dates the property was taken be alleged, but instead the total period of time may be alleged generally. This section shall not be construed as intending to interfere with the power of the court to require the state to furnish the defendant with a bill of particulars in proper cases and on sufficient showing that cause exists for the same."

Florida Statutes Annotated §812.081:

"(1) As used in this section and §812.091:

(a) 'Article' means any object, device, machine, material, substance, or composition of matter, or any mixture or copy thereof, whether in whole or in part, including any complete or partial writing, record, recording, drawing, sample, specimen, prototype, model, photograph, microorganism, blueprint, map or copy thereof.

(b) 'Representing' means completely or partially describing, depicting, embodying, containing, constituting, reflecting, or recording.

(c) 'Trade secret' means the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. 'Trade secret' includes any scientific, technical,

or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:

1. Secret;

2. Of value;

3. For use or in use by the business; and

4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

(d) 'Copy' means any facsimile, replica, photograph, or other reproduction in whole or in part of an article and any note, drawing, or sketch made of or from an article or part or portion thereof.

(2) Any person who, with intent to deprive or withhold from the owner thereof the control of a trade secret, or with an intent to appropriate a trade secret to his own use or to the use of another, steals or embezzles an article representing a trade secret or without authority makes or causes to be made a copy of an article representing a trade secret is guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083.

(3) In a prosecution for a violation of the provisions of this section, it is no defense that the person so charged returned or intended to return the article so stolen, embezzled, or copied."